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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-45

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLEE ON REARGUMENT

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March, 1972

The Daily Record Co., Baltimore Md. 21203

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This is a direct appeal by the United States from a judgment of the United States District Court for the District of Columbia, dismissing five counts of an indictment charging the Appellee, a former United States Senator, with the solicitation and acceptance of bribes in violation of 18 U.S.C. §201. The judgment of the District Court was entered on November 3, 1970 (A. 34), for reasons stated in an unpublished oral opinion delivered on October 9, 1970 (A. 33). This appeal was noted on November 4, 1970 (A. 34-35), pursuant to the Criminal Appeals Act, 18 U.S.C. §3731. Appellee filed a motion to dismiss the appeal and, on March 1, 1971, this Court postponed further consideration of the

question of jurisdiction to the hearing on the merits (A. 35). *United States v. Brewster*, 401 U.S. 935 (1971). Following the submission of briefs, this Court heard oral argument on October 18, 1971, but afterwards ordered reargument. *United States v. Brewster*, 40 U.S.L.W. 3351 (1972).

This direct appeal presents two novel and important questions, formulated by Appellee as follows (App. Br. 2-3):

1. Whether the Criminal Appeals Act, 18 U.S.C. §3731 (as applicable prior to its recent amendment), confers jurisdiction upon this Court not only to review a decision sustaining an affirmative defense on the merits but also to pass upon the constitutional validity of the federal bribery statute, 18 U.S.C. §201, as to which the District Court expressed no opinion.

2. Whether the District Court properly sustained the Appellee's claim of legislative immunity under the Speech or Debate Clause from any prosecution arising out of his performance of legislative acts in the United States Senate.

We have fully discussed the issues in the Brief for Appellee earlier filed and it is our purpose in this Supplemental Brief to clarify matters which were subjects of inquiry during previous oral argument and to record our views concerning them. In no sense, however, does our treatment of this supplementary material supersede or alter the full treatment of issues contained in the Brief for Appellee. Most of those issues are beyond the scope of this Supplemental Brief and it remains necessary to consult the Brief for Appellee for a definitive statement of our position.

I. JURISDICTION

The District Court held, under the agreed facts of this case, that the Speech or Debate Clause of the Constitution

(Article I, §6), as interpreted by this Court in *United States v. Johnson*, 383 U.S. 169 (1966), provides a United States Senator with a constitutional shield against prosecution for alleged bribery in the performance of legislative acts (A. 33). In appealing the decision, the Government has attempted to invoke two provisions of the Criminal Appeals Act which authorize direct appeal to this Court:

> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy. * * * 18 U.S.C. §3731.

There are three distinct reasons why the Government's jurisdictional footing is misplaced. First, the decision below was not one "setting aside or dismissing" the indictment but amounted to a summary judgment on the merits, precluding appeal under any branch of the Criminal Appeals Act (App. Br. 9-15). Second, the decision below was not "based upon the invalidity or construction" of the federal bribery act, 18 U.S.C. §201 (App. Br. 15-17). Third, the decision below was not one sustaining a "motion in bar" (App. Br. 17-20). The second and third contentions have been fully detailed in our earlier brief and we believe they require no further discussion. For the most recent treatment of the "motion in bar" clause, see *United States v. Marion*, No. 70-19, this Term, 92 S. Ct. 455, 459 (1971), decided December 20, 1971.

It is the first contention to which we return. As explained in the Brief for Appellee, the "setting aside or dismissing" language of §3731 was meant to apply only to

dismissals based upon defects in the indictment or in the institution of the prosecution. Where dismissal is based not upon the sufficiency of the indictment alone, but also upon a stipulation of the parties, the effect is an acquittal on the merits not appealable anywhere under §3731. This is particularly true when matters of defense ordinarily triable with the general issue are singled out for pre-trial determination on the merits, as is permissible under Rule 12(b)(1) of the Federal Rules of Criminal Procedure. Since the policy of the Speech or Debate Clause favors resolution on the merits in advance of trial, to insure that "legislators are relieved of the burden of defending themselves", *Powell v. McCormack*, 395 U.S. 486, 505 and n. 25 (1969), we argued that it was entirely appropriate for the Government to proffer the facts and for the District Court to base its decision thereon. For these propositions, we placed primary reliance upon *United States v. Sisson*, 399 U.S. 267, 284-291, 301 (1970); *United States v. Johnson*, 383 U.S. 169, 172, 176, 185 (1966); *United States v. Findley*, 439 F. 2d 970 (1st Cir. 1971); *United States v. Apex Distributing Co.*, 270 F. 2d 747 (9th Cir. 1959). See App. Br. 9-15. In the same context, we also invite the Court's attention to *United States v. Ponto*, 40 L.W. 2469 (7th Cir. 1971) (en banc), decided December 28, 1971.

In dismissing the present indictment, the District Court prefaced its decision as follows:

> Gentlemen, *based on the facts of this case, it is admitted* by the Government *that the five counts* of the indictment which charge Senator Brewster *relate to* the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States. (A. 33) (Italics added).

On this appeal the Government has either ignored or sought to minimize the operative effect of the italicized

words. Its Jurisdictional Statement (at 2-3) was silent as to the factual underpinnings of the decision and its Brief (at 8) flatly denied that the District Court acted upon "any facts special to this case * * *." After the Appellee pointed out that pre-trial disclosures and concessions by the prosecution had enabled the District Court to dispose of the case without necessity of trial (App. Br. 10-11), the Government perceived nothing of the kind (Govt. Rep. Br. 2). During oral argument on October 18, 1971, the Solicitor General represented to this Court:

> In this case there was no stipulation of facts of any sort. There was nothing that could even be regarded as a bill of particulars or anything like that. There were no concessions by the Government of any sort, nor any factual assertions by the Government beyond what is stated in the indictment (Transcript 8).

Because of this inadvertent misstatement, and in order to acquaint this Court with the actual context of the decision below, counsel for Appellee made reference to a confidential memorandum submitted to the District Court (although not formally of record). This memorandum, we explained, outlined the Government's proof as it related to the Appellee's legislative activities (Transcript 23-26). Judging by inquiries from the Court, our reference to the memorandum has engendered some confusion as to its status of record. Clarification is not only desirable, but is indispensable to resolution of the jurisdictional issue.

The confidential memorandum in question is an 11-page document entitled Memorandum of Conferences and dated March 23, 1970. As its name implies, it was the product of conferences between attorneys for the Government and the defendants and was prepared in lieu of a formal bill of particulars, the filing of which would have occasioned

widespread newspaper publicity. By agreement of all counsel the Memorandum of Conferences was submitted *in camera* to the District Judge in July, 1970, months in advance of his ruling upon the Appellee's motion to dismiss. See Addendum hereto, *infra* at 31-32.

While the Memorandum of Conferences was not entered of record prior to dismissal, because of the inherent danger of premature disclosure to the press and public, it was properly considered by the District Judge and repeatedly incorporated by reference into other pre-trial memoranda which were indeed filed of record and which are thus readily available for this Court's inspection.[1] The Govern-

[1] As to memoranda filed on April 20, 1970, see Memorandum of Points and Authorities in Support of Defendant Daniel B. Brewster's Motion for Order to Produce Recorded Testimony of John L. Sullivan Before the Grand Jury (at 1-2); Memorandum of Points and Authorities in Support of Defendant Spiegel, Inc.'s Motion for Order To Produce Recorded Testimony of John L. Sullivan Before the Grand Jury and Statements By Sullivan Relating To the Subject Matter of the Indictment in this Case (at 1-2); Memorandum of Points and Authorities in Support of Defendant Spiegel, Inc.'s Motion for a Bill of Particulars (at 1); Memorandum in Support of Defendant Spiegel, Inc.'s Motion for Order to Produce Books, Papers, Documents, Tangible Objects (at 1-2).

As to Government memoranda filed on July 1, 1970, see Memorandum of Points and Authorities in Support of Government's Answer To Defendant Spiegel, Inc.'s Motion for Bill of Particulars (at 1); Memorandum of Points and Authorities in Support of the Answer of the United States of America To the Motion of Defendant Spiegel, Inc. for Order To Produce Books, Papers, Documents and Tangible Objects (at 1); Government's Answer To the Motion of Defendant Spiegel, Inc. To Dismiss the Indictment on Grounds of Vagueness, Failure To State an Offense, and Non-Applicability of Statute To Corporation (at 2).

As to memoranda filed on July 15, 1970, see Reply Memorandum of Defendant Spiegel, Inc., in Support of Its Motion for an Order To Produce Recorded Testimony of John L. Sullivan Before the Grand Jury and Statements By Sullivan Relating To the Subject Matter of the Indictment (at 1); Reply Memorandum in Support of Defendant Spiegel, Inc.'s Motion for a Bill of Particulars (at 3); Memorandum of Defendant Spiegel, Inc., in Reply To Motions of

ment is certainly not in a position to disavow the Memorandum of Conferences, having acknowledged "the generous discovery the Government has given to the defendants, as evidenced by the Memorandum of Conferences held between defense counsel and attorneys for the Government * * *."[2] The Government also informed the District Court, one week prior to dismissal of the indictment, that the case for the prosecution was outlined in the Memorandum of Conferences:

> In this case, the Government has already given a memorandum [i.e., Memorandum of Conferences] to defendant Brewster *setting forth what it expects to prove at trial. This memorandum will be part of the record in this case.*[3]

Sullivan and the United States in Opposition To the Motion of Defendant Spiegel, Inc., for Production of Items Subpoenaed (at 9).

As to memoranda filed on July 31, 1970, see Memorandum of Points and Authorities in Support of Defendant Daniel B. Brewster's Motion for a Bill of Particulars (at 5).

As to Government memoranda filed on October 1, 1970, see Government's Answer To the Motion of Defendant Daniel B. Brewster To Dismiss the Indictment on Grounds That It Improperly Charges the Defendant as Both a Principal and an Aider and Abettor, That Counts 1, 3, 5, and 7 Are Unconstitutionally Vague, and That the Bribery Statutes Themselves Are Unconstitutionally Vague (at 3).

[2] Memorandum of Points and Authorities in Support of Government's Answer To Defendant Spiegel, Inc.'s Motion for Bill of Particulars (at 1), filed July 1, 1970. In another memorandum, Government counsel wrote: "The Government has attempted to keep disputes over discovery to a minimum by agreeing to confer with defense counsel informally. These conferences have taken place and, as the memorandum of those conferences indicates, the Government has not been tight-fisted in its attitude toward discovery." Memorandum of Points and Authorities in Support of the Answer of the United States Of America To the Motion of Defendant Spiegel, Inc. for Order To Produce Books, Papers, Documents and Tangible Objects (at 1), filed July 1, 1970. Although the foregoing memorandum was addressed to motions filed on behalf of Spiegel, Inc., a co-defendant, the Government treated its memoranda as a sufficient response to identical later-filed motions on behalf of Appellee.

[3] Government's Answer To the Motion of Defendant Daniel B. Brewster To Dismiss the Indictment on Grounds That It Improperly

Nor did the Memorandum of Conferences serve as the exclusive medium of factual disclosure by the Government. In addition, in a letter to the District Judge dated September 30, 1970, Government counsel reiterated that its case hinged upon a showing that the Appellee's votes had been influenced by alleged bribes:

> The Government will contend that all of Brewster's votes in the Senate and in Committee with regard to the postage rate provisions of H.R. 7977 were influenced by the Spiegel payments set forth in the indictment.

On October 1, 1970, eight days before the indictment was dismissed, this letter was filed in the District Court and its contents are a matter of record on this appeal. And it is also a matter of record that H.R. 7977 — the legislation considered and voted upon by Appellee — was ratified by the Senate and enacted into law. See Postal Revenue and Federal Salary Act of 1967, Pub. L. 90-206, 81 Stat. 615, 621, codified at 39 U.S.C. §4001 et seq.

In clarifying the state of the record, we have purposely refrained from divulging the contents of the Memorandum of Conferences. What this Court must recognize is that the decision below was not rendered in an evidentiary vacuum, as the Government presently contends. Neither the parties nor the District Court limited their inquiries to the four corners of the indictment, but agreed that it was necessary to the pre-trial resolution of the constitutional question for the District Court to review the broad outlines of the case to be presented at trial. Argument on the motion to dismiss was premised upon elimination

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Charges, the Defendant as Both a Principal and an Aider and Abettor, That Counts 1, 3, 5, and 7 Are Unconstitutionally Vague, and That the Bribery Statutes Themselves Are Unconstitutionally Vague (at 3), filed October 1, 1970. (Italics added.)

of any controversy over the relationship between the formal charges and the anticipated factual showing as to legislative duties performed by appellee in the Senate. During hearing on the motion the parties expressly disclaimed any dispute on this crucial point. Counsel for Appellee stated (A. 12-13):

> Now, in this regard the papers which have been filed in the case *and the data which has been supplied as respects the claims made against the Defendant Brewster* make it perfectly clear that what is being attacked by this indictment are Senator Brewster's votes in committee and his votes on the floor and his activities in connection with what the Supreme Court has described as things generally done in a session of the House by its members. (Italics added).

Government counsel was in complete agreement. When asked whether the Senator was charged with "anything not related to his purely legislative functions", he replied (A. 28):

> We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts. We are not going to quibble over that.

Absent clear agreement as to the facts, the question could not have been squarely presented. The Speech or Debate Clause is not an automatic, self-executing prohibition against the indictment of Congressmen. It does not shield conduct "that is in no wise related to the due functioning of the legislative process". *United States v. Johnson*, 383 U.S. 169, 172 (1966). Conversely, a prosecution may not attempt to "draw into question the legislative acts of the defendant member or his motives in performing them". *Id*, 185. Between these extremes lie abundant shades of

gray. As *Johnson* holds, a prosecution of a Congressman may run its normal course, if it can be "wholly purged of elements offensive to the Speech or Debate Clause." *Id.*, 185.[4]

In the proceedings below, the Government consistently and forthrightly took the position that its case depended upon scrutiny of the Appellee's legislative acts as a Senator and his motives in performing them. This admission was supported by the factual disclosures volunteered to Court and counsel. Conceding that the Appellee's conduct fell within the protective scope of the Speech or Debate Clause, the Government argued that such protection was not absolute. According to its theory, Congress was not prohibited by the Clause from reaching such conduct by enacting a narrowly-drawn criminal statute delegating authority to the Courts to question the legislative activities of Congressmen.[5] In other words, the Government contended for a statutory exception to the constitutional prohibition otherwise applicable to this case.

The District Court was initially confronted with three possible alternatives. First was the question whether the prosecution's case depended upon proof of legislative acts and motives in relation to the alleged bribes. On this question the Government disclaimed any controversy. The two remaining options reflected the legal contentions of the parties as to the scope of protection afforded under

[4] The case was remanded for a new trial. *United States v. Johnson*, 383 U.S. 169, 180 (1966). On remand, the speech-oriented court was dismissed without Government opposition but Johnson was reconvicted "on the remaining substantive counts which had nothing to do with his speech". *United States v. Johnson*, 419 F. 2d 56, 58 (4th Cir. 1969), cert. denied 397 U.S. 1010 (1970).

[5] Government's Answer To the Motion of Defendant Daniel B. Brewster To Dismiss Counts 1, 3, 5, 7, and 9 of the Indictment as Violative of Article I, Section 6, of the United States Constitution, filed October 1, 1970.

the Speech or Debate Clause, as construed by *United States v. Johnson*, 383 U.S. 169 (1966). If the Clause afforded absolute protection, as appellee contended, then the prosecution must fall irrespective of the statutory underpinnings of the indictment. If not, then the next logical step would have been to consider the Government's contention that the protection afforded by the Clause yields to the asserted power of Congress to delegate punishment of its members under a "narrowly drawn statute".

The District Court did not reach the Government's contention because it held "that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from *any* prosecution for alleged bribery to perform a legislative act" (A. 33) (italics added). We submit that this decision, although couched in terms of dismissal, operated as an acquittal on facts disclosed to the District Court. In this determination the wording of the indictment and the language of the statute were of scant importance. Under the District Court's view of the Clause, if the case had proceeded to trial under *any* indictment, however worded, the same admitted facts would have compelled an acquittal from which no appeal would lie. By its pre-trial review of the facts the District Court found that the case tendered by the Government could not proceed "wholly purged of elements offensive to the Speech or Debate Clause". *United States v. Johnson*, 383 U.S. 169, 185 (1966).

The Speech or Debate Clause "not only provides a defense on the merits but also protects a legislator from the burden of defending himself". *Powell v. McCormack*, 395 U.S. 486, 501-503 (1969). See *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 377

(1951). If a legislator must stand trial and have his legislative conduct evaluated by a jury before he can obtain acquittal, the policy of the Clause is subverted. It was the constitutional duty of the District Court, with the cooperation of the Government, to review the factual outlines of the prosecution in advance of trial and to discharge the Appellee when it appeared that the facts could not serve as the foundation for prosecution. As Judge (later Justice) Van DeVanter once observed, "it would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end". *United States v. Dietrich*, 126 Fed. 676, 678 (D. Neb. 1904). If a concession would justify an acquittal, a dismissal based upon such a concession should also terminate the prosecution and not serve as the springboard for a Government appeal. Surely, "there is little functional justification for reviewing a trial court's action in entering judgment as soon as it becomes apparent that the case must fail, since a judgment of acquittal at the close of the evidence would admittedly not be reviewable even where the trial court offered no reason for its action".[6]

Viewed in this perspective, the action of the District Court "was in reality an acquittal, or, more precisely, a summary judgment on the merits not appealable anywhere under Section 3731". *United States v. Findley*, 439 F. 2d 970 (1st Cir. 1971).[7] See *United States v. Ponto*, 40

[6] Note, *Mandamus To Review Judgments of Acquittal in Federal Courts*, 71 YALE L.J. 171, 173 (1961). "The power of the court to act upon facts conceded by counsel is as plain as its power to act upon facts produced." *Best v. District of Columbia*, 291 U.S. 411, 415 (1934). By analogy, there is no appeal when the Government's opening statement reveals that it has no case and the trial court terminates the prosecution.

[7] In a civil context, summary judgment granted to a Senator was sustained on appeal where, as here, the "record before the District

L.W. 2469 (7th Cir. 1971) (en banc), decided December 28, 1971.

II. THE SPEECH OR DEBATE CLAUSE

A. Oral Argument

The Government attempts to treat this case as one presenting a single issue: "Whether Congress may constitutionally enact a statute providing for judicial sanctions against a member who accepts a bribe for performance of a legislative act, without impinging upon the rights protected by the Speech or Debate Clause" (Juris. St. 5-6; Govt. Br. 12). The entire thrust of its argument, consistently advanced in this Court and during the proceedings below, was that the Clause confers no immunity if Congress itself chooses to specifically provide for judicial trial and punishment of a bribe-taking Member even where the bribe is related to his legislative conduct. Although it was contended that the federal bribery statute, 18 U.S.C. §201, tends to focus upon antecedent conduct in soliciting and accepting bribe payments, the necessary relationship between the bribe and the legislative conduct was never questioned; indeed, it was conceded by the Government.

On oral argument, however, the Solicitor General introduced a new element by asserting (Transcript at 11) that the trial could proceed under the subject indictment without offending the Speech or Debate Clause, as construed by *United States v. Johnson*, 383 U.S. 169 (1966). It was even suggested at one point that the Clause protects only speech or debate on the Senate floor but does not extend

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Court contained unchallenged facts of a nature and scope sufficient to give [him] an immunity against answerability in damages for actions taken in the course of [his] legislative activities". *Dombrowski v. Burbank*, 358 F. 2d 821, 824 (D.C. Cir. 1966), affirmed sub. nom. *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

to other legislative activity (Transcript at 16-17). Assuming a broader construction of the Clause, ran the argument, a conviction could be sustained under the indictment without any showing how the Appellee voted or, indeed, without any evidence that he voted at all (Transcript at 56).

This belated attempt to divorce the claimed acceptance of bribes from the performance of legislative duties prompted several members of the Court to pose a series of hypothetical questions. We were asked whether a Senator would be immune from prosecution

—if he never made a speech or cast a vote but accepted a bribe in return for his promise to perform such an act (Transcript at 29-33).

—if he never made a speech or cast a vote but accepted a bribe in return for his promise to abstain — i.e., not to vote or make a speech (Transcript at 33-35).

—if he accepted one bribe to vote *pro* and accepted another bribe to vote *con* and then took no action at all (Transcript at 35-36).

—if he did not accept a bribe but paid a bribe to another Senator to influence his legislative conduct (Transcript at 40-44).

—if he did not accept a bribe but assaulted another Senator who had interfered with the assailant's vote or had otherwise obstructed the performance of legislative duties (Transcript at 44-47).

—if he did not accept a bribe but assaulted or threatened another Senator in an attempt to influence the victim's vote or performance of other legislative duties (Transcript at 50-52).

We recognize that these extreme postulates represent an understandable and proper attempt by the Court to as-

certain the outer limits of the coverage under the Speech or Debate Clause. We believe that our responses in oral argument are supported by the historic constitutional policy of shielding legislators from executive or judicial inquiry into motives underlying their legislative conduct. Drawing precise lines is a hazardous if not impossible undertaking. The *Johnson* case is the first and only case to interpret the Clause in the context of a bribery prosecution. Although we are satisfied that *Johnson* is controlling under the admitted circumstances of this case, it does not dispose of the wide-ranging hypothetical situations depicted in oral argument.

Nor must they be resolved on this appeal. The indictment recites that Appellee, in his capacity as a Senator, served as a member of the Committee on Post Office and Civil Service. During the First Session of the Nineteenth Congress, that Committee considered legislation to adjust postal rates. The first, third, fifth, and seventh counts of the indictment charged Appellee with soliciting and accepting bribes "in return for being influenced in the performance of official acts in relation to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit" (A. 1-5). The ninth count charged him with accepting a bribe "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity and in his place of trust and profit" (A. 6). As previously discussed, the vague and ambivalent language of the indictment was narrowed by pre-trial disclosures removing all doubt that the Government intended to explore the legislative actions taken by Appellee during the indictment period in an attempt to establish a nexus between such actions and

the alleged bribe payments. In other words, the Appellee stood accused of "being influenced" improperly in all that he did or said with respect to specific postal rate legislation. "The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *United States v. Johnson*, 383 U.S. 169 (1966).

The Government did not join issue below on this point. Its response in the District Court was one of confession and avoidance. It conceded that its case depended upon proof of legislative acts ("they are legislative acts — we are not going to quibble over that", A. 28) but argued that inquiry into motivation for such acts was nevertheless authorized by a "narrowly drawn" statutory exception to the Speech or Debate Clause. The Government framed the issue in terms of the power to connect the alleged payments with legislative duties actually performed by the Appellee.[8] And the District Court accepted the Government's invitation to so construe the indictment:

> Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster *relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.* (A. 33) (Italics added).

That construction of the indictment is binding upon this Court and is not reviewable at the instance of the Government. *United States v. Jones*, 345 U.S. 377, 378 (1953); *United States v. Borden Co.*, 308 U.S. 188, 193, 194 (1939).

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[8] Thus the Government acknowledged in its Brief (Govt. Br. 31 n. 34) that "the instant indictment alleges that both the bribe and the services were carried out".

Ignoring this principle on oral argument, the Government now contends for a limited reading of the indictment: it believes that a conviction could be sustained under the indictment without probing into the Appellee's legislative conduct, votes or motives (Transcript at 56). Such a contention is foreclosed, we submit, by what happened in the District Court. This is not a proper case for deciding in the abstract whether and under what range of circumstances a Senator can be prosecuted for bribery under a different indictment which involves no inquiry into his related votes and motives. The precise question here is whether a Senator can be prosecuted under an indictment which has been construed with binding effect by the District Court as calling into question the Appellee's motives, votes and other legislative conduct. The District Court decided this question in the negative and, on an appeal brought up under the Criminal Appeals Act, this Court's "inquiry is limited to the particular question decided by the court below". *United States v. Mescall*, 215 U.S. 26, 31 (1909). See *United States v. Keitel*, 211 U.S. 370, 398 (1903), and authorities discussed in Brief for Appellee, at 17 n. 9 and 26 n. 15.

Although the District Court construed the present indictment as necessitating inquiries which are offensive to the Speech or Debate Clause, we shall assume the contrary and proceed to consideration of the hypotheticals posed during oral argument. These may be reduced to a common denominator. In each instance a theoretical Senator has resorted to bribery, assault, threats or other reprehensible techniques to achieve a legislative result. Unquestionably, the Senate would have plenary jurisdiction to investigate and punish the offending member. Article I, Section 5, Clause 2 of the Constitution so provides. Without the intervention of the Speech or Debate Clause, it may be

assumed that the antecedent behavior would be amenable to ordinary prosecution under a criminal statute defining the offense.

We submit that the Speech or Debate Clause absolutely precludes prosecution of a Senator, if an element of the crime requires inquiry into what he says or does as a legislator. No evidence from any source of his legislative acts or motives may be used to convict him. For example, if a Senator sponsoring a bill were to threaten or assault an opponent of the measure in an attempt to coerce a change in attitude, the act could be prosecuted only to the extent that his purpose or motives are not called into question. This would be a mixed question of fact and statutory definition. And if threats were uttered or an assault committed during the heat of debate in a legislative session, it is arguable that the Clause would bar prosecution altogether even if the crime was not defined in terms of specific intent. Even Bernadette Devlin was not prosecuted by the Crown for her irate physical attack on the Home Secretary during a recent Session of Parliament, although newspaper accounts did mention the possibility of disciplinary sanctions by her peers in the House of Commons.

The subject of bribery is not so conjectural. It is not an offense under 18 U.S.C. §201 for a public official to corruptly seek or accept a monetary reward. Only when he does so in return for being influenced in his performance of official duties is the offense complete. If the public official is a Senator and the duties to be performed are legislative, an accusation of bribery would necessarily require proof of his intentions as manifested by his actual behavior. The present indictment does not charge mere corruption; it states that the object was to influence the appellee's "action, vote, and decision on postal rate legislation" — conduct which is unmistakably legislative in character and

within the sphere of activity directly related to his duties as a member of the Senate Committee on Post Office and Civil Service.

To suggest that a Senator may be prosecuted for what he does or what he fails to do or what he intends to do with respect to postal rate legislation, or to impute shadowy motives to his conduct with respect thereto, is to subvert the entire history, purpose, and prior applications of the Speech or Debate Clause. We need not reiterate the manifold objectives of the Clause; these have been discussed at length (App. Br. 20-49). Suffice it to say, as this Court has always held, "that the privilege should be read broadly, to include not only words spoken in debate, but anything generally done in a session of the House by one of its members in relation to the business before it". *United States v. Johnson*, 383 U.S. 169, 179 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 374-376 (1951); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). A Senator's deliberations and processes in reaching a decision on legislation preparatory to his actual votes assuredly meet this description.

In the *Johnson* case this Court considered and rejected the Government's argument, resurrected here, that the Speech or Debate Clause does not cover prosecutions founded on "the antecedent unlawful conduct of accepting or agreeing to accept a bribe". *Id.* 182. What the Government overlooked then, as it apparently does now (at least in oral argument), is that "the language of the Constitution is framed in the broadest terms" and "that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House". *Id.* 182-183. With respect to the hypothetical examples, it would be a narrow view of the privilege to hold it inapplicable where a legis-

lator "goes fishing" instead of casting a formal vote. If the prosecution can succeed only by proving what motivated his abstention, he need not answer the charges or face inquiry into any position taken on a legislative measure which came to him for decision.

Despite the restrictive approach adopted in oral argument, the Government is on record as conceding wide latitude to the Clause:

> Whatever the precise limits of *Johnson*, we do not contend that the Clause protects only speech. "Committee reports, resolutions, and the act of voting are equally covered, as are things generally done in a session of the House by one of its members in relation to the business before it" (Govt. Br. 11 n. 5).

When the Department of Justice is not engaged in prosecuting legislators, it champions the privilege. As it argued so cogently in briefing *Dombrowski v. Eastland*, 387 U.S. 82 (1967), wherein a Senator was charged as a conspirator with Louisiana officials, the conduct of a Senator is absolutely privileged if it relates to legislative concerns:

> The test is simply whether the act is such as is "generally done in a session of the House by one of its members in relation to the business before it" (*Kilbourn v. Thompson*, *supra* at 204) or whether the legislators "were acting in a field where legislators traditionally have power to act" (*Tenney v. Brandhove*, *supra* at 379). A legislator loses immunity only for conduct "that is in no wise related to the due functioning of the legislative process". *United States v. Johnson*, *supra* at 172.

Government Brief (31-32) in *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

By claiming a power to punish a Senator in the courts for corruption in connection with his legislative duties,

the Government is really arguing that the executive and judicial branches may decide when and where and in what manner the Senator may discharge his public trust. But the purpose of the Clause was "to prevent intimidation by the executive and accountability before a possibly hostile judiciary". *United States v. Johnson*, 383 U.S. 169, 181 (1966) (involving a prosecution based upon allegations "that a member of Congress abused his position *by conspiring* to give a particular speech in return for remuneration from private interests"). If a Senator were indeed to sell his vote, that would be a grossly improper discharge of his legislative duties but nonetheless within the clear scope thereof. Is it compatible with the Speech or Debate Clause for a jury to decide whether he abused his trust by acting dishonestly? We think not, if *Tenney v. Brandhove*, 341 U.S. 367 (1951) serves as a reliable guide:

> * * * The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. * * * In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. *Id.* 377-378.

It must be stressed that the privilege does more than insulate a legislator from attempts to punish him for the things he does and says in the performance of his legislative duties. The privilege also protects him against having to defend or explain his conduct in any way. As explained in *Powell v. McCormack*, 395 U.S. 486, 502-503 (1969):

> [T]he Clause not only provides a defense on the merits but also protects a legislator from the burden of defending himself [Citations omitted]. Our cases make it clear that the legislative immunity created by

> the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation.

How a legislator performs legislative duties cannot be opened to inquiry in the courts, even though the legislator's methodology is deplorable. While the hypothetical cases posited during oral argument may appear extreme, the fact remains that a Senator who employs threats, accepts bribes, or commits assaults to achieve purely legislative ends has never been considered amenable to prosecution. Many such instances are recorded in the annals of Congress but have not been encountered in the courts. When confronted by analogous misconduct, this Court has consistently declined to authorize trial or punishment by a jury. *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (false imprisonment by Congressmen asserting unconstitutional prerogatives); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (obvious efforts to harass a witness in violation of Civil Rights Act); *United States v. Johnson*, 383 U.S. 169 (1966) (bribed speech); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (conspiracy with Louisiana officials to seize property and records in admitted defiance of Fourth Amendment). We do not believe that the hypothetical questions warrant a different approach.

The broad immunity of Senators can sometimes work to the detriment of individual citizens or harm national interests when it is abused. But the privilege exists, nonetheless, because the experience of history has demonstrated its necessity and because the federal judiciary has resolutely declined each and every invitation to relax it. To make its existence turn on the fine distinctions between the ultimate act of voting and the decisional processes ante-

cedent to such act, as urged on this appeal, is to further depreciate the independence of the people's representatives in our tripartite form of government.

B. The Senator Gravel Case

The Court has agreed to review another recent application of the Speech or Debate Clause, this one involving a grand jury inquiry into the activities of a United States Senator in divulging the contents of the so-called Pentagon Papers, which were a matter of concern to this Court in *New York Times Company v. United States*, 403 U.S. 713 (1971). The case is *United States v. Doe*, 332 F. Supp. 930 (D. Mass. 1971), modified and affirmed — F. 2d — (1st Cir.), decided January 7, 1972, certiorari granted *sub nom Gravel v. United States*, 40 U.S.L.W. 3398 (1972) (Nos. 71-1017 and 71-1026, this Term), February 22, 1972.

The *Doe* case arose when a staff member of Senator Gravel of Alaska moved to quash a subpoena ordering him to appeal before a federal grand jury investigating a myriad of crimes related to the release and dissemination of the Pentagon Papers. Although Senator Gravel was not personally subpoenaed, he intervened in the proceedings and moved to quash the subpoena issued to his staff assistant, Dr. Leonard S. Rodberg. Among the points urged by Senator Gravel and Dr. Rodberg was the contention that the subpoena contravened the Speech or Debate Clause.

It appears from the reported opinions that Senator Gravel, without authorization, obtained a copy of the Pentagon Papers at a time when publication was restrained by order of this Court. *New York Times Company v. United States*, 91 S. Ct. 2270 (1971). The Senator was Chairman of the Senate Subcommittee on Public Buildings and Grounds,

and there is some controversy over the plausible relevance of these documents to the work of the Subcommittee. Nonetheless, Senator Gravel called a meeting of the Subcommittee, read to it a summary of the high points, and then introduced all 47 volumes of the Pentagon Papers as an exhibit.

Despite differences between the instant case and Senator Gravel's, there are striking similarities as well. In the first place, the grand jury was investigating alleged criminal activity in which a United States Senator played a key role. It was Senator Gravel's legislative conduct which linked him as a participant. The crimes under investigation included the retention of Government records with intent to convert (18 U.S.C. §641) and the gathering and *transmitting of national defense information* (18 U.S.C. §793). See *United States v. Doe*, 332 F. Supp. at 932. Under the Government's approach to the Speech or Debate Clause in this case, it would be arguable that Senator Gravel's "antecedent conduct" in obtaining allegedly stolen national defense material constituted a prosecutable criminal offense, although related to his role as a legislator, whereas his disclosure of such material to the Subcommittee would be privileged.

Second, the technique of inquiring into a Senator's conduct by subpoenaing his staff assistant has a direct parallel in the instant case. As made abundantly clear by the motions on file in the District Court and included in the record on this appeal, the indictment against Appellee was obtained primarily on the basis of grand jury testimony given by the Appellee's chief administrative aide, John L. Sullivan. Certainly it was not unrealistic for the District Court, in passing upon Appellee's motion to dismiss, to assume that the prosecution's case in chief would hinge in all probability upon the testimony of his trusted confidant.

Therefore, it is instructive to observe the manner in which the First Circuit dealt with these factors in the *Doe* litigation. Since its opinion has not yet been reported, it is printed in the Addendum hereto, *infra* at 32-45.

In reliance upon *United States v. Johnson*, 383 U.S. 169 (1966), the District Court sustained Senator Gravel's claim of privilege under the Speech or Debate Clause. It held that Clause applicable "to legislative acts *and antecedent conduct so intimately related to them such as cannot be proved without resort to inquiry into legislative acts*". *United States v. Doe*, 332 F. Supp. at 934 (italics added). Legislative acts were defined to include "things generally done in a session of the House by one of its Members in relation to the business before it", *id.* 935, in line with the classic formulation in *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). Nor did the District Court perceive any justification for narrowing the scope of the Clause when criminal rather than civil liability is sought to be imposed:

> In view of the primary purpose of the privilege "to prevent intimidation by the executive and accountability before a possibly hostile judiciary", *United States v. Johnson*, *supra*, 383 U.S. at 181, 86 S. Ct. at 755, the protection of the privilege afforded by the Speech or Debate Clause may be broader in criminal proceedings than in civil. Therefore the court sustains Senator Gravel's claim that whatever he did at the subcommittee meeting on June 29 *and certain acts in preparation therefor* are privileged.

United States v. Doe, 332 F. Supp. at 935. Accordingly, the District Court issued a protective order forbidding grand jury inquiry of *any* witness about Senator Gravel's conduct at the Subcommittee meeting and "about things done by the Senator in preparation for and intimately related to said meeting". *Id.* 938.

This order was affirmed on appeal. In an opinion unfavorable to Senator Gravel in some respects, and although Senator Gravel "essentially lost his appeal", Addendum, *infra* at 45, the First Circuit adopted the District Court's rationale in prohibiting inquiry into the Senator's conduct antecedent to the subcommittee report. Chief Judge Aldrich, writing for a unanimous panel, conceded that the proceedings were not a frontal attack on the Clause in the form of a criminal prosecution for illegal conduct in obtaining classified information, but merely involved "the extent to which the constitutional privilege bars grand jury questioning". Addendum, *infra* at 38. In his opinion it was immaterial whether the questioning of such conduct occurs before the grand jury or before a petit jury. "The legislator need not answer questions anywhere." *Ibid.* Nor would it be consonant with the Speech or Debate Clause, according to that view, to shelter Senator Gravel's public disclosures while leaving his antecedent surreptitious conduct exposed to grand jury scrutiny and censure.

> It seems manifest that allowing a grand jury to question a Senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them. Whatever the accommodation that must be made with respect to the public interest in prosecuting crime, we cannot accept that it is to be drawn in favor of permitting direct inquiry of a legislator. Addendum, *infra* at 38-39 (citations omitted).

The other facet of the *Doe* litigation pertinent to this appeal lies in the holding that the Government may not attempt by indirection what it cannot achieve directly. As stated, the District Court in *Doe* barred grand jury questioning of *any* witness concerning Senator Gravel's legislative activity and antecedent conduct. It also ordered that Dr. Rodberg, his staff assistant, "may not be ques-

tioned about his own actions * * * to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Building and Grounds or in preparation for and intimately related to said meeting". *United States v. Doe*, 332 F. Supp. at 938. In support of its holding the District Court reasoned that Dr. Rodberg's own activities were "also protected from investigation, not because of any privilege of his own but by reason of his having acted as the Senator's agent and assistant in the Senator's performing various legislative acts". *Id.* 937. To have ruled otherwise would have diluted and jeopardized the privilege itself, since a legislator's dependence upon confidential assistants is indispensable to the performance of legislative duties. *Ibid.*

The Court of Appeals was in agreement on this point also.

> It is not only accepted practice, but, we would think indispensable, for a legislator to have personal aides in whom he reposes total confidence. This relationship could not exist unless, during the course of his employment, the aide and the legislator were treated as one. (Addendum, *infra* at 43.)

Even with respect to outside third parties, who were certainly not immune from inquiry as to their own conduct regarding the Pentagon Papers, the Speech or Debate Clause was held to impose limits where the object of questioning is to attack legislative motives. Thus Chief Judge Aldrich stated that "it could not be shown that the defendant's speech was written by a constituent or that the defendant was paid to deliver it". Addendum, *infra* at 44. Accordingly, the District Court was instructed to fashion an order "that no questions be asked of any other witness as to communications with intervenor regarding legislative activities, including the furnishing of information or

with his aides during such period directed to the intervenor's motives or purpose in introducing the Papers into the subcommittee records". Addendum, *infra* at 45.[9]

The balanced approach to the Speech or Debate Clause in the *Doe* litigation, at two stages of federal judicial review, stands in stark contrast to niggardly reading advocated here by the Government. What the Department of Justice has already done, as the record reveals on the present appeal, is to winnow out confidential information from a Senator's "trusted" aide and to parade it before a grand jury, without any semblance of the protective safeguards mandated in *Doe*. The Appellee's trial promised to be a repeat performance, in all likelihood tracing his conduct from alleged payment through the entire legislative routine — to discussions with staff members; to informal communications with Senate colleagues, constituents, and lobbyists; to committee sessions; to ultimate vote on the floor of the Senate — all in relation to postage rate legislation. Perceiving in the indictment a design to bring legislative conduct of a Senator into disrepute, the District Court rightly declined to entertain further proceedings.

C. The Senator Hartke Case

In our treatment of the Speech or Debate Clause, we have investigated other arenas of public decision-making in which there has been a "textually demonstrable constitutional commitment" to the Senate (App. Br. 49-63). One such arena is the power to judge elections staked out in Section 5 of Article I, as construed by *Reed v. County Commissioners of Delaware County, Pennsylvania*, 277

[9] For a still more recent holding to the same effect as to staff assistants, see *Doe v. McMillan*, 40 L.W. 2471 (D.C. Cir. 1972), decided January 20, 1972.

U.S. 376 (1928); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929), and other decisions of this Court which were fully canvassed in the Brief for Appellee. Both opinions in *Roudebush v. Hartke*, 40 U.S.L.W. 4171 (1972) (Nos. 70-66 and 70-67, this Term), decided February 23, 1972, lend further support to our submission that the exclusive competence of the Senate under the Speech or Debate Clause to judge the legislative performance of its Members is an integral part of the configuration of constitutional powers vested in that body by Article I of the Constitution.

CONCLUSION

For the reasons stated in the Brief for Appellee, as amplified herein, we respectfully submit that the appeal should be dismissed for want of jurisdiction or, in the alternative, that the judgment of the District Court be affirmed.

Respectfully submitted,

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March, 1972

ADDENDUM

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Re: *United States v. Brewster, et al.*

Gentlemen:

Pursuant to our agreement, this afternoon I personally hand-delivered a copy of the Memorandum of Conferences dated March 23, 1970 to Judge Hart for his in camera inspection. I indicated to him that we were in the process of preparing an appropriate protective order in order that this Memorandum not be released so as to generate prejudicial

publicity prior to trial. The Judge indicated that he would rather have this matter handled by stipulation. I told him that I thought this was entirely appropriate and such a stipulation would be drafted.

Sincerely,

WOB:gap WILLIAM O. BITTMAN

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 71-1331
and 1332

UNITED STATES OF AMERICA,

v.

JOHN DOE.

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

No. 71-1335

UNITED STATES OF AMERICA,
Appellant,

v.

JOHN DOE.

Appeals from the United States District Court
for the District of Massachusetts

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

David R. Nissen, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, and *War-*

ren P. Reese, Assistant United States Attorney, were on brief, for the United States.

Robert Reinstein and *Herbert O. Reid, Sr.* with whom *Charles L. Fishman* was on brief, for Mike Gravel, United States Senator.

Doris Peterson, *Peter Weiss*, *James Rief*, and *Morton Stavis* on brief, for Leonard Rodberg, Amicus Curiae in case No. 71-1335.

January 7, 1972

ALDRICH, *Chief Judge*. These cross appeals raise important questions as to the extent of the privilege afforded by the Speech or Debate Clause of the Constitution. This clause, the separate and concluding part of Article I, Section 6, Clause 1, provides that ". . . for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The issues arise in the context of a motion to limit the testimony that can be presented to a federal grand jury. The facts are these.

A copy of classified Defense Department documents, now widely known as the Pentagon Papers, containing hitherto unpublished facts concerning the background and conduct of the Vietnam War, found itself, unauthorizedly, in the hands of Senator Gravel, the junior senator from Alaska. The Senator was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He called a meeting of the subcommittee, read to it a summary of the high points, and then introduced the entire Papers, allegedly some 47 volumes and said to contain seven million words, as an exhibit. Thereafter, he allegedly supplied a copy of the Papers to the Beacon Press, a Boston publishing house, owned by the Unitarian-Universalist Society, for publication.

These matters and the events preceding them have attracted the attention of a grand jury in the Massachusetts District. The court found, "The crimes being investigated by the grand jury include the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371)." (Strictly, the court misused the word "public.")

Among other summoned witnesses were Leonard S. Rodberg, a legislative assistant to Senator Gravel, and Howard Webber, director of M.I.T. Press. Rodberg objected to testifying, on the ground of invasion of his First Amendment rights of freedom of association and freedom of the press, and in addition, on the ground that as a legislative assistant to the Senator, he is protected by the Speech or Debate clause. The Senator himself has not been called, and the Department of Justice has stated that it has no intention of calling him. The court, however, permitted the Senator to intervene in the proceedings for the purpose of arguing that his own privilege under the Speech or Debate clause requires that the subpoenas issued to Rodberg and Webber be quashed, and that a protective order be issued suppressing certain other testimony. The resulting order the Senator, as the present appellant, finds too limited, and the government, as cross-appellant, too broad.

JURISDICTION

The government, correctly, points out that if the subpoena that was sought to be quashed was directed to intervenor, there could be no appeal from the refusal to quash unless he took the further step of refusing to comply, and was adjudi-

cated in contempt. *Cobbledick v. United States*, 1940, 309 U.S. 323; *United States v. Ryan*, 1971, 402 U.S. 530. Here, however, the subpoena was not addressed to intervenor, but to third parties who could not be counted on to risk contempt in order to protect intervenor's constitutional rights. *See United States v. Ryan*, ante, at 533. Hence he was "powerless to avert the mischief of the order" unless permitted to appeal it. *Perlman v. United States*, 1918, 247 U.S. 7, 13. The government's effort to take the case outside the *Perlman* exception, by arguing that intervenor will not suffer irreparable injury if the grand jury hears the evidence, assumes the correctness of its claims that no injury is cognizable unless and until intervenor is indicted. *Perlman*, however, illustrates that, to the contrary, a court, in determining whether an intervenor will suffer irreparable injury unless allowed to appeal, should assume his claim to be correct. We hold, therefore, that the order denying intervenor's motion is appealable.

The Issues

The court's order, so far as presently material, provided as follows:

> "(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor about things done by the Senator in preparation for and intimately related to said meeting.
>
> "(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

This order was preceded by a comprehensive recitation of facts, some of which we do not repeat, and discussion of the legal principles. *United States v. John Doe, In re Rodberg*, D.C. Mass., 1971, 332 F. Supp. 930. By a subsequent order the court refused further relief, except for a brief temporary stay, which we extended.

The response of both parties is extreme. Intervenor's brief suggests that the entire inquiry is improper.

> "There probably is no clearer case of the prostitution of the grand jury process than is daily evidenced [here]. . . . This Court is thus presented by the government with a flagrant misuse of the subpoena power of the grand jury. . . . [by the executive]. This represents a fundamental perversion of the function of the grand jury. . . ."

The government does not make the rejoinder that intervenor's own action in disclosing documents which were, in his own words, "critical of Executive conduct in foreign affairs," had no conceivable relevance to the functions of the Subcommittee on Public Buildings and Grounds; a matter which would seem self-evident.[1] While recognizing that that claim would be (at least largely, see post) irrelevent, it does take the extreme position that while legislators may not be questioned "for" their speech or debate, in the sense of being held accountable, they may be freely questioned "about" them.

"Speech or Debate"— The Scope of the Privilege

The areas in which intervenor objects to questioning are three — speech or debate itself, or publication; preparation,

[1] Nor does the government point out that intervenor, although relying elsewhere on the public's "right to know," (*see* n. 5, post) basically is seeking to block exposure of how he exposed what, in turn, the Executive did not wish to have exposed.

or pre-publication, and, finally, republication. We will consider them in that order.

a) *Publication*

For what he says or does on the floor of the Senate, or before the subcommittee, intervenor is concededly protected by an absolute privilege from all criminal and civil liability. *See United States v. Johnson*, 1966, 383 U.S. 169; *Tenney v. Brandhove*, 1951, 341 U.S. 367. It is equally clear that this protection extends to any written reports of the committee proceedings addressed to Congress, including material unspoken at the hearing but inserted directly into the record. *See Kilbourne v. Thompson*, 1880, 103 U.S. 168, 204; *McGovern v. Martz*, D.D.C., 1960, 182 F. Supp. 343, 347. The privilege protects against a claim of irrelevancy, *see Cochran v. Couzens*, D.C. Cir., 1930, 42 F. 2d 783, 784, as well as of falsity and malice. The government would argue that intervenor could be questioned "about" his conduct for this very reason, drawing the analogy that one who is immune from prosecution cannot claim the protection of the Fifth Amendment.

In our view this misconceives the scope and purpose of the Speech or Debate clause, which is not principally to protect the person and pocketbook of legislators, but, rather, is to ensure freedom of debate. *United States v. Johnson*, ante, at 180-82. Intimidation of a legislator, harassment, embarrassment with the electorate, all may be achieved short of obtaining a criminal or civil judgment. *Cf. United States v. Johnson*, 4 Cir., 1964, 337 F. 2d 180, 191, *aff'd*, 383 U.S. 169. Since these consequences can flow from mere inquiry, the possibility of judicial inquiry could itself serve as an effective deterrent to speaking out against executive policy. *Id.* Further, although it seems to us relatively less important, the time required to respond to

such an inquiry would be inconsistent with another purpose of the Speech or Debate clause, which is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks." *Powell v. McCormack*, 1969, 395 U.S. 486, 504; *see Tenney v. Brandhove*, ante, at 377. We cannot accept the government's distinction between questioned "for" and questioned "about."[2] Nor do we think that the place of questioning, whether it be before the grand jury or before a petit jury, determines its palatability. The legislator need not answer questions anywhere.

b) *Pre-publication*

Turning to the pre-publication period, we note that we are concerned not with whether a legislator may be protected from prosecution for illegal conduct in obtaining information for use in a congressional proceeding, but only with the extent to which the constitutional privilege bars grand jury questioning. Different considerations may well apply. Effective debate presupposes access to facts. *See generally* Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1, 36 (1968). Since the scope of the privilege should be as broad as is necessary to achieve its purpose of assuring full and free debate, *see Stockdale v. Hansard*, 1839, 9 Ad. & E. 2, 150, 112 Eng. Rep. 1112, 1169, we include therein inquiries which would restrict acquisition of information. It seems manifest that allowing a grand jury to question a senator about his sources would chill

[2] On the other hand, while we are discussing terminology, except insofar as his hypothetical quoted above may so suggest, we do not believe intervenor contends that his constitutional protection against questioning means that the government cannot prove alleged wrongful acts by others which, by implication, may bring his own conduct "into question." There could be no merit in such a claim.

both the vigor with which legislators seek facts, and the willingness of potential sources to supply them. *Cf. Caldwell v. United States*, 9 Cir., 1970, 434 F. 2d 1081, *cert. granted* 402 U.S. 942. Whatever the accommodation that must be made with respect to the public interest in prosecuting crime, *cf. Dombrowski v. Eastland*, 1967, 387 U.S. 82, we cannot accept that it is to be drawn in favor of permitting direct inquiry of a legislator.[3] To what other persons this protection may extend we will consider later. All government action cannot be frozen in the name of chilling speech. *Cf. United States v. O'Brien*, 1968, 391 U.S. 367.

c) *Republication*

Intervenor in his appeal contends that the clause comprehends not only the delivery of a congressional speech and conduct antecedent thereto, but also conduct subsequent to the speech aimed at its wider dissemination, including private republication. Apart from republication such as in the news media or the Congressional Record, which is the natural consequence of a speech and is necessarily protected, *see McGovern v. Martz*, ante, at 347, no American court appears to have decided this question.[4] *But cf. id.; Long v. Ansell*, D.C. Cir., 1934, 69 F. 2d 386, 389, *aff'd* 293

[3] In *New York Times v. United States*, 1971, 403 U.S. 713, the Court accommodated related free speech interests in holding that the newspaper's conduct could not be enjoined, although, as pointed out in Mr. Justice White's concurring opinion, it may have been criminal. *Id.* at 730-41.

[4] We put to one side cases refusing an injunction, as involving different considerations. *See Hentoff v. Ichord*, D.D.C., 1970, 318 F. Supp. 1175; *Methodist Federation for Social Action v. Eastland*, D.D.C., 1956, 141 F. Supp. 729; *cf. New York Times v. United States*, n. 3 ante. In the more common situation, it has long been settled that the publication of defamation, although actionable, may not be enjoined. *Hart v. Crosby v. Bradstreet Co.*, 2 Cir., 1963, 312 F. 2d 483, 485, *cert. denied* 373 U.S. 911; *Kidd v. Horry*, CC. E.D. Pa., 1886, 28 F. 773.

U.S. 76. In urging us to resolve it in his favor, intervenor acknowledges that it will not affect his freedom to speak, since the speech has already been made, but argues that republication is essential to the "due functioning of the legislative process," *United States v. Johnson*, ante, 383 U.S. at 172, and is "generally done" by members of Congress.[5] *Kilbourne v. Thompson*, ante, at 204. *See also Stockdale v. Hansard*, ante, at 150, 1169. The difficulty is that the term "legislative process" is no more self-defining than "Speech or Debate." The language and history of the Speech or Debate clause is a surer guide to the scope of the privilege than catch-phrases, and we find in both a focus upon matters occuring in the course of deliberation. This had been the English concept upon which our privilege had been patterned.[6] Two English cases, decided shortly after the enactment of the American constitution, held that the parliamentary privilege did not immunize members from civil liability for libels contained in privately published reproductions of their parliamentary speeches. *Rex v. Creevey*, 1813, 1 Maule & Selwyn 273; *Rex v. Lord Abington*, 1795, 1

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[5] "The Framers presuppose[d] the maximum amount of communication between the citizens and their elected representatives."

"The people must be informed fully of the workings of government."

"The heart of representative democracy is the communicative process between the people and their agents in government."

"Informing the electorate is a 'legislative act' since it is clearly 'related to the due functioning of the legislative process.' *United States v. Johnson*, *supra* at 172. In fact, it is not exaggeration to say that direct communication between a Member of Congress and the electorate is an essential bedrock of the legislative process, for it insures that the people will inform *him and his colleagues* [sic] of their well-considered views on pending and future legislation — an indispensable prerequisite for each Congressman deciding how to cast his own vote."

[6] "[I]t may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source." *Kilbourne v. Thompson*, ante, at p. 202.

Esp. N.P. Cases 223. See generally T. E. May, Treaties on the Law, Privileges, Proceedings and Usage of Parliament 48-66 (16th ed. F. Fellowes & T.G.B. Cocks 1957); C. F. Wittke, The History of English Parliamentary Privilege 23-32 (1921). Our courts have expanded the privilege beyond the act of debating within Congress a proposal before it only when necessary to prevent indirect impairment of such deliberations. *See Kilbourne v. Thompson*, ante; *Coffin v. Coffin*, 1808, 4 Tyng (Mass.) 1.

We do not find private republication within that category. The fact that it may be customarily done by members of Congress is not the answer.[7] Only those acts by which a congressman ordinarily expresses to the House his views on matters before it come within the Supreme Court's extension of the privilege to "things generally done . . . *in relation to the business before [Congress]*." *Kilbourne v. Thompson*, ante, at 204. (Emphasis supplied).

Intervenor's argument that communicating with the electorate is essential to effective deliberation because it elicits responses to guide his legislative decisions and because it helps to put pressure upon other legislators, (n. 5, ante, 4) proves too much. If accepted, it would bring within the privilege not only republished congressional speech, but speeches delivered anywhere. But even restricted to repeating what has once been said in a legislative context, the consequences of an unlimited absolute privilege would be staggering. We do not believe intervenor has struck

[7] *Cf. United States v. Johnson*, ante, at 172. There the Court observed that an attempt to influence the Department of Justice in favor of a constituent was unprotected, yet assisting constituents is just as customary a function as communicating with them. See generally V. O. Key, Politics, Parties and Pressure Groups (3d ed. 1952); R. Davidson, The Role of the Congressman 99 (1969).

such gold in a field previously thought to be barren.[8] The fact that some repetition may be inevitable does not mean that there should be immunity to add to it. *Cf. Murray v. Brancato*, 1943, 290 N.Y. 52 (no privilege for judge to circulate privately a calumnious opinion); see Annot., 146 ALR 913. We will not hold that there is a constitutional privilege to print privately what, we must assume for present purposes, were classified documents simply because intervenor had first disclosed them to a Senate subcommittee whose function was totally unrelated thereto.[9]

The fact that republication is not within the constitutional privilege does not exclude consideration of other protection. To the extent that a congressman has responsibility to inform his constituents, his performance of that responsibility may be protected from liability by a common law privilege, as is an executive official's. A news release about the speech may well be as protected as the speech itself. *Cf. Barr v. Mateo*, 1959, 360 U.S. 564 (absolute immunity given executive officer for libel contained in news release). How far this immunity should go will depend upon the facts of the particular case. An even more difficult question is whether the measure of the grand jury's right to make personal inquiry of the legislator follows the immunity. Arguably, it may go further, or not so far. Because we do not consider this a matter of present substantial im-

[8] Those with long memories may recall the frequent, but unaccepted, challenges to a former junior senator from Wisconsin to repeat outside the walls of Congress the calumnies he often expressed within their protection. If our memory is correct, we would see no reason for distinguishing between the types of legislative speech that could be repeated.

[9] Examples might be multiplied. If an unpublished manuscript was stolen by parties unknown and subsequently was introduced into the records of a Congressional committee, could it be thought that the common law copyright was lost by reason of the Speech or Debate clause? Or, in the case of a published work, that the statutory copyright would thereby be extinguished?

portance, and partly because the court is not in total agreement, we presently resolve it, without binding ourselves for future purposes, if the matter is more sharply put, that he may not be questioned at all as to republication.[10] We do not, of course, mean by this that we are ruling, even tentatively, on the limits of criminal liability.

WITNESSES PRECLUDED

It may be wondered why, since under *Cobbledick v. United States*, ante, until he has been held in contempt we apparently have no jurisdiction to advise intervenor as to the measure of his immunity from testifying, we have nevertheless been answering that question. The reason is that such answer is a necesssary condition to passing upon the immunity of others, such as Rodberg, who intervenor claims in this appeal to come under his legislative protection. We now turn to this.

a) *Legislative Aides*

It is not only accepted practice, but, we would think indispensable, for a legislator to have personal aides in whom he reposes total confidence. This relationship could not exist unless, during the course of his employment, the aide and the legislator were treated as one. To the extent, if any, that there might be exceptions, again, for present purposes, we do not inquire. We note, however, that this synonymity is founded upon the relationship, not on the fact of employment. Rodberg, for example, is not protected from inquiry as to events unconnected with intervenor at the time of occurrence. We reject intervenor's contention that the fact of hiring insulated him from all inquiry as to

[10] In part we do this because we propose, so far as possible, to make a practicable decision that avoids unnecessary or doubtful points that might burden the Supreme Court.

prior events related to the Papers, but not to intervenor. *See Heine v. Raus*, 4 Cir., 1968, 399 F. 2d 785, 790-91.

b) *Third Parties*

United States v. Johnson, ante, holds that any person who dealt with a legislator with respect to speech or debate can not be inquired of if the object is to attack the legislator's motives in speaking. Specifically, it could not be shown that the defendant's speech was written by a constituent or that the defendant was paid to deliver it. The Court did not suggest that a legislator was free in all respects from criminal prosecution. *But see id.*, at 185. Indeed, were it to be thought so, one need only turn to the other portions of the Clause, which regulates, procedurally, criminal trials. With respect to third persons, provided that the principles of *Johnson* are observed, we can see no reason for them to be free of inquiry as to their own conduct regarding the Pentagon Papers, including their dealing with intervenor or his aides. We have already spoken as to Rodberg, pre-employment. At the other end, so far as intervenor's privilege is concerned, we hold that no immunity was conferred upon Beacon Press simply because, if he did, intervenor delivered the Papers to it for private publication. Indeed, we would hold, if his appeal can be thought to raise that question,[11] that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to intervenor or others in connection with the Papers subsequent to their introduction into the subcommittee records. Payment for delivering a copy, by a post-speech agreement, is not com-

[11] We infer that intervenor believes it does, in the light of a contempt proceeding he instituted when he erroneously believed the United States Attorney was using a subpoena to examine the Beacon Press records during the processing of this appeal.

parable to a payment for initially delivering the speech. Similarly, the district court's refusal to include Webber in its order was correct.

PROCEDURE

Intervenor has presented us with a request covering the type of witnesses he believes should be excluded altogether, and an elaborate procedure for the court to employ as to testimony the government proposes to introduce through other witnesses. Much of this request goes by the board with our rejection of some of his basic premises. As to the rest we find such procedure unnecessarily cumbersome, and suggest a simpler solution. Intervenor may supply a list of his personal aides, and the dates of their employment. Upon the court's being satisfied as to the correctness of the list it shall order that no questions be asked of any of them relating to the Pentagon Papers or to intervenor's legislative activities during the period of their employment. It shall further order that no questions be asked of any other witness as to communications with intervenor regarding legislative activities, including the furnishing of information, or with his aides during such periods, directed to intervenor's motives or purpose in introducing the Papers into the subcommittee records. We believe the contempt power of the court will be a sufficient guarantee of enforcement without the need of adopting intervenor's extraordinary request that every question be submitted to him for approval before it is asked.

Except to the extent that it is modified herein the order of the district court is affirmed. Even though intervenor has essentially lost his appeal, we do not believe this an appropriate case in which to award costs.